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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Plaintiff and Respondent, v. E*TRADE GROUP, INC., Defendant and Appellant.	A125073 (San Francisco County Super. Ct. No. 506839)

Appellant previously sued Respondent, its insurer, to determine coverage obligations for underlying commercial litigation in which appellant was a party. The coverage litigation was resolved by settlement agreement. In this case the insurer has sued, alleging breach of that settlement agreement by appellant, and including a claim for fraud in connection with the breach. The insured brought a special motion to strike the fraud claim as a SLAPP action[1] pursuant to Code of Civil Procedure section 425.16.[2] The trial court denied the motion. We affirm concluding, as did the trial court, that the fraudulent conduct alleged does not qualify as protected activity within the meaning of the anti-SLAPP statute.

[1] SLAPP is an acronym for strategic lawsuit against public participation. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn. 1 (*Equilon*).)

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

BACKGROUND

The operative Second Amended and Supplemental Complaint (Complaint) in issue here alleges that E*TRADE Group, Inc., now known as E*TRADE Financial Corporation (ETrade), breached a 2003 settlement agreement with Certain Underwriters at Lloyd's, London (Underwriters) resolving the prior insurance coverage litigation between these two parties.[3]

The Complaint alleges that in late 2001 ETrade was sued by Fiserv Securities, Inc. (Fiserv), Wedbush Morgan Securities, Inc. (Wedbush), and Nomura Securities International, Inc. (Nomura) in three separate actions. All three actions arose out of transactions in which MJK Clearing, Inc. (MJK), using E*TRADE Securities, Inc. (an ETrade subsidiary) as a "run through," loaned stock in exchange for cash and then ceased operations, going into receivership. ETrade demanded that Underwriters defend and indemnify it in the three actions, arguing the claims against it were covered by its Management and Organizational Liability Insurance Policy (Policy) with Underwriters. Underwriters disputed coverage and in 2002 ETrade filed an action to determine coverage for the claims (the Coverage Litigation).

In September 2002, ETrade sued Deutsche Bank, Nomura, and Nomura Canada, Inc. for fraud in connection with the MJK transactions (the Nomura Litigation). It alleged that those defendants manipulated the prices of various stocks so that ETrade bore the losses resulting from the dissolution of MJK, and that as a result of the defendants' fraud ETrade had been sued by Fiserv, Wedbush, and Nomura. ETrade settled with Deutsche Bank in May 2003 but continued to prosecute its claims against Nomura and Nomura Canada, Inc. (hereafter, Nomura).

In July 2003, ETrade and Underwriters executed a settlement agreement (Agreement) resolving the Coverage Litigation. Under the terms of the Agreement, ETrade was obligated to reimburse Underwriters for some portions of amounts which

[3] As we must on review of the denial of a SLAPP motion, we accept Underwriters' evidence as true unless it is defeated as a matter of law. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733.)

Underwriters had paid to ETrade as Policy losses, dependent upon the amount of any net recovery ETrade might obtain in the Nomura Litigation.[4]

In December 2005, ETrade settled its pending third party litigation with Nomura and recovered $35 million. Underwriters alleges that ETrade and its agents at this time "began to devise a carefully-orchestrated scheme to hide the recovery from Underwriters so that [ETrade] could convert the entire $35 million payment for its own benefit." ETrade and its outside counsel, Munger, Tolles & Olson LLP (Munger Tolles), "addressed at length the issue of how to deal with [ETrade]'s obligations to Underwriters under the Agreement in light of Nomura's anticipated $35 million settlement payment." Although ETrade determined that it owed Underwriters a portion of the Nomura recovery under the terms of the Agreement, its vice-president told its employees and agents involved in the matter not to contact Underwriters "until we've had our call confirmed [regarding] how we intend to proceed."

Contrary to the requirements of the Agreement, ETrade did not directly notify Underwriters' outside counsel, Duane Morris, of its recovery from Nomura. Instead, ETrade's vice-president produced an email he expected to be shown to London-based agents for Underwriters. The email stated, "As a result of our settlement with Nomura, there will be no need for [U]nderwriters to make any contribution to the Nomura settlement . . . ," and made no mention of ETrade's $35 million net recovery from Nomura. An insurance broker for ETrade informed a London-based claims handler for Underwriters that ETrade had settled the Nomura actions "without requiring any further contribution from Underwriters" and that "as a result of the settlement, Underwriters should close their file on this matter." Underwriters closed its files in response to these communications. When ETrade officials learned by January 2006 that Underwriters had

[4] Underwriters sought and obtained leave of court to file the portions of the pleadings setting forth the substantive terms of the Agreement under seal, redacting those paragraphs in the publicly filed Complaint. ETrade did not oppose the request.

closed its files, they expressed delight, commenting that the brokers had delivered the "best case scenario."

Unaware of the London communications, Duane Morris on April 3, 2006, asked ETrade about the status of the Nomura actions. ETrade responded that it had settled with Nomura without requiring any further contributions from Underwriters and understood Underwriters had closed its files. "[O]nly after [Duane Morris]'s repeated insistence, did [ETrade] . . . supply [Duane Morris] with a copy of the Nomura settlement agreement reflecting the $35 million recovery. Upon reviewing the terms of the agreement, [Duane Morris] immediately demanded by e-mail that [ETrade] comply with its duties under the Agreement and determine the amount of the rebate due Underwriters." ETrade refused to pay any portion of the Nomura recovery to Underwriters, as allegedly required under the Agreement.

In December 2006, ETrade informed Duane Morris that it had recovered more than $2 million from the bankruptcy estate of Native Nations, a third-party entity identified in the Agreement as subject to allocation of recoveries. Underwriters demanded a portion of this recovery, but ETrade refused payment.

On December 7, 2006, Underwriters sued ETrade for breaching the Agreement by "failing and refusing to remit to Underwriters, pursuant to an allocation formula set forth in the Agreement, their share of a $35 million third-party [Nomura] recovery made by [ETrade] in December 2005. [ETrade] also violated the terms of the Agreement by failing to provide notice of such recovery to Underwriters' counsel within thirty (30) days. Instead of timely notifying Underwriters' counsel, [ETrade], in an improper attempt to avoid its payment obligations and reap an unjust windfall, actively concealed the fact of the recovery from Underwriters."[5] The initial complaint included causes of

[5] This passage from the complaint was filed under seal. However, both parties freely discuss the substance of this passage in their appellate briefs, which were *not* filed under seal. Therefore, the parties' interest in maintaining the privacy of this information has been forfeited. (*Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1245 (*Hurvitz*) ["there can be no privacy with respect to a matter which is already public or which has previously become part of the 'public domain' "].)

action for breach of contract, breach of the implied covenant of good faith and fair dealing, and restitution.

On December 12, 2008, Underwriters filed the operative Complaint. Based on matters disclosed in discovery, Underwriters added allegations that ETrade knew it was contractually obligated to pay Underwriters a portion of the Nomura recovery, but converted that sum by engaging in a "carefully-orchestrated scheme with its agents to hide the Nomura Recovery from Underwriters and defraud them out of the proceeds due under the Agreement." The Complaint added causes of action for fraud and conversion.

ETrade demurred generally to the new causes of action and filed a special motion to strike the fraud claim as a SLAPP. ETrade argued the claim arose from its protected activity because the claim was "based on [ETrade]'s communications with Plaintiff-Underwriters regarding the status of its litigation with Nomura. Those communications were also directly connected to the resolution of [ETrade]'s insurance coverage litigation against Plaintiff-Underwriters, and constitute protected communications [under the litigation privilege] . . . ."

In an April 30, 2009 written order, the court overruled the demurrer and denied the anti-SLAPP motion. On the latter issue, the court wrote: "The alleged fraudulent actions at issue in this case were not connected with pending or impending litigation. All litigation between the parties had been resolved before the occurrence of the communications that gave rise to this case. No evidence suggests that, at the time of the e-mail communications which form the basis of Plaintiffs' fraud cause of action, any litigation was reasonably likely to occur. . . . [¶] The Court recognizes that prior litigation between the parties resulted in a settlement agreement, which constitutes the contract allegedly breached in this instant case. Even though the contract was created in the course of litigation, carrying out the terms and conditions of the contract is a commercial activity, not a protected activity. . . . [¶] Plaintiffs[] base their fraud cause of action on the content and context of a series of e-mail communications . . . . The fact that these communications referenced a prior lawsuit or settlement does not render them protected activity under section 425.16(e)."

ETrade appeals from the denial of its anti-SLAPP motion, as authorized by section 425.16, subdivision (i) and section 904.1, subdivision (a)(13).[6]

DISCUSSION

Section 425.16, the anti-SLAPP statute, provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Under the statute, the party moving to strike a cause of action has the initial burden to show that the cause of action arises from an act in furtherance of the moving party's right of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon, supra,* 29 Cal.4th at p. 67.) Once that burden is met, the burden shifts to the opposing party to demonstrate the probability that it will prevail on the claim. (§ 425.16, subd. (b)(1); *Equilon*, at p. 67.) An appellate court independently reviews whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) We consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based," accepting as true the allegations and evidence of Underwriters except insofar as ETrade's evidence defeats it as a matter of law. (§ 425.16, subd. (b)(2); *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1267, fn. 2 (*Hylton*).)

"Litigation is activity protected by the speech and petition clauses." (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 449 [citing *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734–735 (*Jarrow Formulas*)].) Under the anti-SLAPP statute, an "act in furtherance of a person's right of petition" is specifically defined to include: "(1) any written or oral statement or writing made before a legislative,

[6] ETrade does not challenge the denial of its demurrer.

executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (§ 425.16, subd. (e).) Thus, statements made before a court during litigation or otherwise made in connection with litigation often constitute protected activity within the meaning of the anti-SLAPP statute. For example, protected activity may include investigating a claim or sending a prefiling demand letter when litigation is seriously anticipated,[7] filing a lawsuit or counterclaim[8]; making arguments to the court during a lawsuit,[9] commenting about litigation in public or private[10]; and negotiating a settlement.[11]

That the factual basis for a legal claim involves litigation, however, does not automatically bring the claim within the protections of section 425.16. The claim must *arise from* the protected activity to merit anti-SLAPP protection. "[T]he mere fact that an

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[7] *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322, fn. 11, 325, fn. 12 (prefiling demand letters); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (counseling of client); *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1285–1286 (investigation and prelawsuit notices); *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 31–32 (voice message by attorney for adverse party, which threatened litigation).

[8] *Jarrow Formulas, supra,* 31 Cal.4th at pp. 734–735; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90 (*Navellier*) (filing of counterclaims allegedly in breach of settlement agreement); *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1479–1480.

[9] *Navellier, supra,* 29 Cal.4th at p. 90 (arguments made to federal court allegedly amounted to breach of a settlement agreement).

[10] *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 821–822 (soliciting donations to support litigation and promoting boycott), disapproved on another ground by *Equilon, supra,* 29 Cal.4th at p. 68, fn. 5; *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055 (litigation update); see *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1174–1175 (private comment about public issue).

[11] *Navellier, supra,* 29 Cal.4th at p. 90 (negotiation of a release involves statements made in connection with a judicial proceeding); *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 (*Dowling*); *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 842 (*Navarro*); *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 905 (*GeneThera*).

action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity. [Citations.]" (*Navellier, supra,* 29 Cal.4th at p. 89.) Thus, "we disregard the labeling of the claim [citation] and instead 'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies' . . . . [Citation.] We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.]" (*Hylton, supra,* 177 Cal.App.4th at p. 1272, only citation omissions added.)

These principles are well illustrated in a series of opinions holding that legal malpractice actions do not fall within the protections of the anti-SLAPP statute. In *Freeman v. Schack,* for example, plaintiffs sued an attorney for abandoning them as clients and assuming representation of parties with adverse interests to theirs. (*Freeman v. Schack, supra,* 154 Cal.App.4th at p. 722.) The court explained: "There is no doubt plaintiffs' causes of action have as a major focus Schack's actions in representing Hemphill . . . , filing a new action on Hemphill's behalf and settling Hemphill's action. However, the fact plaintiffs' claims are related to or associated with Schack's litigation activities is not enough. . . . [¶] . . . [¶] . . . [T]he principal thrust of the conduct underlying their causes of action is not Schack's filing or settlement of litigation. . . . [T]he 'activity that gives rise to [Schack's] asserted liability [citation] is his undertaking to represent a party with interests adverse to plaintiffs, in violation of the duty of loyalty he assertedly owed them . . . ." (*Id.* at pp. 729, 732, last instance of bracketed material in original.)

Similarly, in *Hylton* the court held, "Although petitioning activity is part of the evidentiary landscape within which Hylton's claims arose, the gravamen of Hylton's claims is that [his attorney] Rogonzienski engaged in nonpetitioning activity inconsistent

with his fiduciary obligations owed to Hylton: Rogozienski falsely advised Hylton . . . [and] concocted and carried out a scheme to manipulate his representation of Hylton in a manner to justify extracting an excessive fee . . . ." (*Hylton, supra,* 177 Cal.App.4th at p. 1272; see also *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1539; *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617, 1628; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1181; *Jesperson v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 627.)

In contrast, a lawsuit arising from an attorney's allegedly unethical or otherwise wrongful representation of an adverse interest may come within the protection of the anti-SLAPP suit if the gravamen of the cause of action is the legal representation itself. (See *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5–6 [allegedly defamatory letter by opposing attorney to nonparties regarding lawsuit was protected activity]; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 673 ["thrust of plaintiffs' claims may be that [the firm's] conduct helped advance the Ponzi scheme [but] some of the specific conduct complained of involves positions the firm took in court, or in anticipation of litigation with the SEC [and] [w]e cannot conclude these allegations of classic petitioning activity are merely incidental or collateral to plaintiff's claims"].)

The principles are further illustrated in cases addressing landlord-tenant disputes. In *Marlin*, the court held that a lawsuit seeking a declaration of the parties' rights under the Ellis Act (which allows landlords to withdraw properties from the rental market) did not arise from the landlord's filing of an Ellis Act notice, even though it was triggered by the filing of that notice. (*Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 157, 160 (*Marlin*).) "Defendants have fallen victim to the logical fallacy post hoc ergo propter hoc—because the notices preceded plaintiffs' complaint the notices must have caused the plaintiffs' complaint. The filing and service of the notices may have *triggered* the plaintiffs' complaint and the notices may be *evidence* in support of the plaintiffs' complaint, but they were not the cause of plaintiffs' complaint. Clearly, the cause of

plaintiffs' complaint was defendants' allegedly wrongful reliance on the Ellis Act as their authority for terminating plaintiffs' tenancy." (*Id.* at p. 160, italics added and footnotes omitted.) Similarly, a claim for wrongful eviction, although it followed the prosecution of an unlawful detainer action, did not arise from the unlawful detainer action. (*Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1286.) "Clark's complaint . . . is not premised on Mazgani's protected activities of initiating or prosecuting the unlawful detainer action, but on her . . . fraudulent eviction of Clark for the purpose of installing a family member who never moved in." (*Ibid.*) On the other hand, a claim for *retaliatory* eviction does arise from the filing of the unlawful detainer action. (*Feldman, supra,* 160 Cal.App.4th at pp. 1475, 1479–1480.) The filing of the action itself is the allegedly wrongful act.

Published decisions addressing anti-SLAPP motions in the context of settlement discussions or agreements also reflect this analysis. In *GeneThera*, plaintiff's counsel sent a letter to defense counsel extending an offer to settle an action as to one defendant alone. (*GeneThera, supra,* 171 Cal.App.4th at p. 905.) The remaining defendants sued plaintiff's counsel, alleging the offer of settlement constituted an intentional interference with contractual relations and negligence. (*Id.* at p. 906.) The court held the "communication of an offer to settle the ongoing lawsuit" was protected activity and the claim was subject to a motion to strike. (*Id.* at p. 908.) In *Navellier* and *Navarro*, the plaintiff's fraud claim arose from allegedly deceitful statements made in the context of negotiating a settlement or stipulated judgment. (*Navarro, supra,* 134 Cal.App.4th at p. 842; *Navellier, supra,* 29 Cal.4th at pp. 87, 90; see also *Dowling, supra,* 85 Cal.App.4th at pp. 1407–1409, 1420 [defamation, misrepresentation and emotional distress claims arose directly from an attorney's letter to a third party regarding pending litigation, which preceded a stipulated judgment].) The conduct underlying the plaintiffs' claims in these cases was the very act of negotiating a settlement.

Here, Underwriters' fraud claim does not arise from the negotiation of a settlement agreement. The gravamen of Underwriters' fraud claim against ETrade is not that ETrade engaged in protected litigation activity such as filing a lawsuit, settling a lawsuit, or commenting about a lawsuit. Rather, the gravamen of the claim is that ETrade

deliberately made misleading statements, withheld information, and breached its contractual duties under the Agreement to deprive Underwriters of its contractual entitlement to compensation from the Nomura and Native Nations recoveries.

Litigation obviously filled the "evidentiary landscape" in which these claims arose. (See *Hylton, supra,* 177 Cal.App.4th at p. 1272.) The allegedly wrongful acts unquestionably followed and were triggered by developments in underlying litigation. (*Marlin, supra,* 154 Cal.App.4th at p. 160.) The statements alleged to have been made in connection with the coverage litigation certainly constitute evidence in support of Underwriters' fraud claim. (*Ibid.*) These facts are nevertheless immaterial because the wrongful conduct underlying Underwriters' claim is intentional misrepresentation or concealment, not the assertion of its right to petition the government for relief through the judicial process or to comment on a matter under consideration in a judicial proceeding, or to negotiate terms of settlement.

ETrade seeks to characterize its conduct as analogous to protected settlement negotiations when it writes, "[a]t the time of the communications and conduct [underlying the fraud claim], the coverage action remained *unresolved* because it had *not* been—and indeed would *never* be—dismissed with prejudice" and because "the spectre of litigation [loomed] over [ETrade] and the Underwriters and would soon cause the Underwriters to bring the present action against [ETrade]." ETrade notes that the Agreement required ETrade to initially dismiss the Coverage Litigation *without prejudice* and provided that the dismissal would not be deemed to be with prejudice until final fulfillment of the terms of the Agreement.[12] However, the fact that some obligations of the Agreement anticipated future performance, or that disputes might potentially arise about that performance, does not automatically cloak all related activity with anti-SLAPP protection. (*McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009)

[12] ETrade again freely discusses the substance of the provision, filed under seal in the trial court, in its opening brief and Underwriters has not objected. Therefore, the parties' interest in maintaining the privacy of the information has been forfeited. (See *Hurvitz, supra,* 84 Cal.App.4th at p. 1245.)

175 Cal.App.4th 169, 172–173.) Therefore, regardless of whether any aspect of the Coverage Litigation remained pending, the fraud claims arises from conduct relating to contractual performance, and the conduct alleged here does not constitute protected activity. (See *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1118 (*Applied Business Software*) [defendant's entering of a settlement agreement during pendency of litigation was a protected activity, but defendant's subsequent alleged breach of that agreement after case concluded was not a protected activity].)

With respect to anticipation of future litigation (i.e., the instant lawsuit), ETrade's allegedly fraudulent conduct was undertaken "in anticipation of litigation" only in the sense that any breach of legal duty carries with it the inherent potential of a lawsuit. The communications alleged here were not made to investigate, assert or attempt to settle a dispute with Underwriters about the proper interpretation of the Agreement that might ultimately ripen into litigation. Rather, Underwriters alleges ETrade deliberately misled it in order to deprive Underwriters of its rights under the Agreement.

Finally, we reject a distinction ETrade sought to draw at oral argument between the breach of contract and fraud causes of action in Underwriters' complaint for purposes of applying the anti-SLAPP statute. As noted, ETrade moved to strike only the fraud claim and not the breach of contract claim as a SLAPP. ETrade acknowledges that breach of a settlement agreement is not protected activity. (See *Applied Business Software, supra,* 164 Cal.App.4th at p. 1118.) ETrade does not persuasively explain why a cause of action framed in tort invokes SLAPP protections, while one based on the same conduct, but pled in contract, does not. The statute defines a SLAPP as a claim that "arise[s] from any *act*" in furtherance of the defendant's right of petition or free speech. (§ 425.16, subd. (b)(1), italics added.) That is, the application of the statute is determined by the *conduct* of the defendant that gives rise to a claim, not the nature of the claim, the evidence that can be used to prove the claim, the objective or subjective nature of the elements of the claim, or the extent of damages that can be recovered if the claim is proven. The same conduct that underlies Underwriters' breach of contract claim (failure

to notify Duane Morris of the Nomura recovery and failure to reimburse Underwriters as a result of that recovery) also underlies the fraud claim. Moreover, evidence that ETrade made statements designed to mislead Underwriters about its contractual entitlements would support both claims. Neither the SLAPP statute nor any cited authority supports the position ETrade urges.

Because we conclude Underwriters' fraud claim against ETrade does not arise from protected activity under the anti-SLAPP statute, we need not address the second prong of the anti-SLAPP analysis. (*Freeman v. Schack, supra,* 154 Cal.App.4th at p. 733.)

DISPOSITION

The April 30, 2009 order denying the motion to strike is affirmed. ETrade shall pay Underwriters' costs.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Simons, J.